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No. 82-1302

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

SEA-LAND SERVICE, INC.,

Petitioner,

v.

CARL O. AKERMANIS,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. When the court of appeals, at the urging of both the Petitioner and the Respondent, reversed the judgment of the district court on the ground that the district court did not have legal authority to order a remittitur based on an alleged error by the jury in assessing the degree of contributory negligence attributable to the Respondent, did the court of appeals have authority to remand the case to the district court with instructions to reconsider the district court's order which conditionally granted a new trial to Petitioner if the Respondent did not accept the remittitur?

2. After the court of appeals reversed the district court's judgment, without specific instructions from the court of appeals, did the district court have authority to reconsider its order conditionally granting a new trial or was the district court bound to proceed with the new trial even though it concluded that the new trial had been erroneously granted?

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STATUTE AND RULE INVOLVED

28 U.S.C. §2106

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Rule 50, Federal Rules of Civil Procedure

(c) Same: Conditional Rulings on Grant of Motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party

who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

COUNTERSTATEMENT OF THE CASE

The Respondent, a veteran seaman, sued his Employer, the Petitioner herein, under the Jones Act (46 U.S.C. §688) for injuries sustained on June 4, 1977 while working on board the Petitioner's ship. The case was tried before a jury in June 1981. In response to detailed interrogatories submitted by the district court, the jury found that the Petitioner's negligence proximately caused the Respondent's accident and the jury assessed damages in an amount in excess of \$500,000. Also in answer to a special interrogatory, the jury found four percent contributory negligence on the part of the Respondent. In response to the Petitioner's post-trial motions, the district court in a Memorandum, Opinion and Order dated October 14, 1981 (Appendix C)* denied the motion for judgment n.o.v. but granted a motion for a new trial on liability only unless the Respondent accepted a remittitur of all damages "in excess of that amount resulting from application of a 25% reduction for contributory negligence."

The Respondent accepted the remittitur and consented to the entry of judgment reflecting the twenty-five percent contributory negligence assessment made by the district court. In filing his consent to the entry of judgment on a reduced jury verdict, the Respondent specifically did not "waive any rights which [he] may have to cross-appeal in the event of an appeal by the [Petitioner]." (Appendix H)

After the district court entered judgment on the reduced verdict (Appendix E), the Petitioner appealed to the United States Court of Appeals for the Second Circuit. The Respondent filed a cross-appeal.

The decision of the court of appeals, reported at 688 F.2d 898, is set forth as Appendix A to the Petition. The

* All references are to the Appendices to the Petition for Writ of Certiorari.

court held that it was improper for the district court to order a remittitur based upon an alleged error in the jury's assessment of contributory negligence. Both the Petitioner and the Respondent argued to the court of appeals that the remittitur was improper; the Petitioner does not attack this conclusion made by the court of appeals. Based on its holding that the remittitur was improper, the court of appeals vacated the district court's judgment. The court of appeals said it would then consider the Respondent's cross-appeal.

The court first discussed whether it had jurisdiction over the cross-appeal. It concluded that it did despite the general rule, confirmed in *Donovan v. Penn Shipping Co.*, 536 F.2d 536 (2d Cir. 1976) affirmed Per Curiam, 429 U.S. 648 (1977), that a plaintiff who accepted a remittitur waived his right to appeal. The court of appeals reasoned that the general rule should not be applied in this case where the remittitur related not to damages but to contributory negligence. The court found that the district court had absolutely no legal authority to interfere with the jury verdict by way of such a remittitur. Since the district court had no authority to order the remittitur, the Respondent's acceptance of the remittitur could not and should not serve as a bar to the Respondent's right to appeal. Although the court of appeals did not specifically so hold, it is submitted that when the court of appeals held that the remittitur was improper, and therefore reversed the district court judgment, the district court's order conditionally granting a new trial was also effectively vacated.

The court of appeals suggested that it would be unfair and impractical for it to hold that the district court lacked authority to order such a remittitur but that the Respondent had waived its right to appeal by consenting to the improper remittitur.

In reality what the court was saying was that the order granting a new trial was conditioned upon the Respondent accepting the remittitur. Since there was but a

single judgment and a single order by the district court, in fairness, as a matter of common sense and as a matter of sound jurisprudence, the failure of the condition because of legal impossibility, rendered the entire order (including the conditional grant of a new trial) null and void. The court of appeals concluded that under the unique circumstances of this case, the rule prohibiting an appeal by a plaintiff who accepted a remittitur simply did not apply.

Actually the rule provided that a litigant who accepted a remittitur could not attack the remittitur by way of appeal. In this case the court had reversed the remittitur based on the Petitioner's appeal. The rule did not preclude the Respondent from attacking the order conditionally granting a new trial once the remittitur had been set aside as improper.

The court also reasoned that since the Petitioner's appeal was properly before it and had been ruled upon, judicial economy and efficiency dictated that the court would entertain the Respondent's cross-appeal. In so holding, the court of appeals relied upon its power under Rule 50(c) and (d) of the Federal Rules of Civil Procedure to entertain attacks on orders conditionally granting a new trial.

Although the court of appeals clearly stated that it was considering the Respondent's cross-appeal, the Respondent believes that it was not necessary for the court to have done so in taking the action that it did. In considering the Petitioner's appeal, the court of appeals held the remittitur was improper. To remedy that error, the court reversed the district court judgment and remanded the case to the district court. The court of appeals made no further order or judgment. Since the final judgment of the district court was vacated, on remand the district court had full authority on its own, without any further guidance or direction from the court of appeals, to reconsider its conditional grant of a new trial. Although the court of appeals discussed issues raised by

the Respondent in its cross-appeal, in fact and in law, the court of appeals did not enter any order as to the cross-appeal. The court did offer suggestions to the district court as to the options available to the latter on remand.

The court of appeals decision was issued on September 14, 1982. The Petitioner's Petition for Rehearing In Banc was denied on October 28, 1982 (Appendix B).

On remand, after the submission of briefs by the parties, the district court considered the issue of the Petitioner's right to a new trial. On January 18, 1983, just eight days prior to the filing of the Petition for Certiorari in this Court, the district court issued a Memorandum, Opinion and Order (Appendix F) in which it considered the Petitioner's motion for a new trial.

The district court concluded, in the exercise of its discretion and for independent reasons not mentioned by the court of appeals but explicitly set forth in the district court opinion, that a new trial should not be granted. The district court concluded that its prior discussion of the basis for the jury's contributory negligence assessment and the court of appeals' discussion of that issue were both incorrect and that on balance there was ample support for the jury's determination of a four percent contributory negligence factor.

The district court denied the Petitioner's motion for a new trial. Thereafter judgment was entered in favor of the Respondent in the full amount of the jury verdict subject to the 4% reduction based on the contributory negligence assessment. On March 3, 1983, the Petitioner filed a Notice of Appeal from the final judgment entered by the district court. That appeal is currently pending in the court of appeals.

SUMMARY OF ARGUMENT

The decision of the court of appeals does not involve any novel or complex issue nor does it in any way conflict with the decisions of this Court or those of other courts of appeals. Thus, there is no important or special reasons for the granting of the Petition in this case.

To a great extent, the Petitioner's arguments are based on a misinterpretation and mischaracterization of the decision of the court of appeals designed to suggest that the court's decision impacted upon the right to a trial by jury under the Seventh Amendment. This mischaracterization is ironic since, as held by the court of appeals, the district court by ordering the remittitur in the first place, interfered with the Respondent's right to a jury trial and not with the Petitioner's right to a jury trial. Fortunately, the court of appeals corrected this error by holding that the remittitur, which was based upon the district court's change in the contributory negligence allocation, was improper since it represented intrusion in the exclusive province of the jury. There has been no interference with the right to a jury trial since all issues were fully and properly submitted to the jury. The result now is that, after the remand, the jury's verdict has been fully implemented. The Petitioner can hardly complain that it has been denied the right to a trial by jury.

The Petitioner does not attack the court of appeals holding that the remittitur was improper. In fact, the Petitioner urged that result in the court of appeals. The Petitioner does not and cannot argue with the order of the court of appeals which reversed the judgment of the district court.

The entire thrust of the Petitioner's argument relates to the rather simple but highly theoretical and conceptual question as to what remained of the district court judgment and order after the remittitur was held invalid. The district court entered a conditional order to

the effect that a new trial would be granted unless the Respondent accepted a remittitur. The Respondent accepted the remittitur and thus a new trial was not granted. The court of appeals held that the district court had no authority to order a remittitur relating to contributory negligence since this would violate the Respondent's right to a trial by jury.

The only remaining issue concerned the status of the case on remand. The Petitioner argues that after the district court judgment was reversed, the conditional order granting a new trial somehow became effective and mandatory. The Petitioner contends that on remand it was entitled to a new trial and that neither the court of appeals nor the district court had power to order otherwise.

It is the Respondent's position that once the court of appeals reversed the district court's order, the order conditionally granting a new trial had no continuing life, vitality or effect. The only alternative left to the court of appeals, whether it considered the Respondent's cross-appeal or not, was to remand the entire case to the district court to consider the outstanding motion for a new trial. On remand, in the absence of a final order or judgment, the district court was free to consider *ab initio* the motion for a new trial.

The Respondent contends that this Court need not decide the issue raised by the Petitioner whether the court of appeals had jurisdiction over the cross-appeal because the court of appeals had power to reverse the judgment and remand without considering the cross-appeal.

It is submitted that after the final judgment was properly vacated by the court of appeals, the district court had inherent power to rescind or modify its interlocutory order granting a new trial. More than that, since the order was conditional and the condition failed because of legal impossibility, simple logic would dictate that the new trial order itself failed and could not revive

on its own. In any event, since the district court entered the conditional order, it was only proper to remand to allow the district court to decide what it should do knowing that the remittitur was not available to it. No case cited by the Petitioner remotely suggests that following reversal of the judgment, the order for a new trial somehow mystically was transformed to an unconditional order impervious to challenge.

In order to present a basis for the granting of the Writ, the Petitioner argues that the court of appeals' decision conflicts with this Court's decision in *Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977) which prohibits an appeal by a plaintiff who has accepted a remittitur which the trial court had legal authority to offer. Since the court of appeals held that the district court had no authority to offer the remittitur, the *Donovan* rule does not apply.

The *Donovan* rule prohibits a plaintiff from attacking a remittitur by way of appeal on the theory that the plaintiff cannot attack that to which he has consented. In this case, the Respondent was not attacking the remittitur, the Petitioner had successfully done that. In this case, the Respondent was attacking the order conditionally granting a new trial. See Rule 50(c) and (d). The result reached by the court of appeals was correct even if the court did not have the power to consider the cross-appeal. Without considering the appeal, the court of appeals had authority to remand to the district court for further proceedings.

REASONS FOR DENYING THE WRIT

A. The court of appeals had jurisdiction to entertain the Respondent's cross-appeal.

Although the Respondent does not believe that it was necessary for the court of appeals to decide that it had jurisdiction over the cross-appeal (see Section B below), it is clear that the court of appeals did find that it had jurisdiction to consider the cross-appeal notwithstanding the fact that the Respondent had agreed to the remittitur.

The court of appeals properly distinguished this Court's Opinion in *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977) on the grounds that in the instant case the court had concluded that the district court did not have power to order a remittitur based upon an adjustment in the contributory negligence percentage. In *Donovan*, the remittitur was based upon an adjustment in the damages assessed by the jury. Prior decisions of this Court had held that a remittitur on damages is permissible. A plaintiff who accepted such a remittitur on damages was precluded from challenging the remittitur on appeal.

In *Donovan*, this Court spoke of remittitur in terms of the role of the courts in reviewing the size of jury verdicts. 429 U.S. at 649. As pointed out by the court of appeals, the remittitur which the district court used in this case did not involve a review of the size of the damage award but a change in the jury's assessment of comparative negligence. The decisions of this Court upholding damage remittiturs but precluding damage additurs (see *Dimick v. Schiedt*, 293 U.S. 474 (1935)) clearly require the conclusion that remittitur in regard to contributory negligence is an impermissible interference in the jury's province. Thus, the rule of *Donovan* cannot properly be applied to this case for two reasons: (1) the Respondent could not be bound by his consent to an act by the court which the court had no legal authority to take; and (2)

the Respondent's cross-appeal, as considered by the court of appeals, did not attack the remittitur but the order conditionally granting the new trial.

In this case, the court of appeals found that the district court was absolutely without authority in ordering a remittitur in relation to contributory negligence because such a remittitur interfered with the right to a trial by jury. The Petitioner does not challenge the court of appeals' holding on the remittitur issue. The court of appeals stated that it was "conceptually difficult and practically unfair" to hold that the Respondent had waived its right to appeal by consenting to a judgment that no longer existed. The case was before the court of appeals on the Petitioner's appeal and there was no reason not to entertain the Respondent's appeal. This Court's decision in *Donovan* simply does not speak to the unique facts of the instant case.

Since in accepting the remittitur, the Respondent had specifically reserved its right to appeal in the event of an appeal by the Petitioner (Appendix H), the Respondent's appeal was properly before the court of appeals.

B. The result reached by the court of appeals is correct even without a finding that it had jurisdiction to consider the cross-appeal.

The judgment of the district court from which the appeal and cross-appeal were taken is set forth at Appendix E to the Petition. There is but a single "JUDGMENT ON A REDUCED VERDICT." Once the court of appeals determined that the district court had no authority to order the remittitur, the court reversed the judgment of the district court. This reversal of the judgment of the district court had the effect of not only setting aside the remittitur but also setting aside the order conditionally granting the new trial. Once the court of appeals reversed the district court's judgment, nothing remained of that judgment.

It is, of course, possible to argue that theoretically the two parts of the district court's order and judgment could be separated and that once the remittitur was set aside, the order for a new trial could stand unconditionally on its own. However, this is not how the judgment and order were written. The two were structured in conditional language. The district court gave the Respondent the option of accepting the remittitur or facing a new trial. When the Respondent accepted the remittitur, the new trial grant no longer was operative. When the court of appeals held that the district court had no authority to impose such a condition upon the Respondent, the entire judgment and order had to be set aside by the court of appeals.

Once the court of appeals reversed as to the remittitur, even if the court of appeals had not gone on to discuss or consider the cross-appeal, the result on remand to the district court would have been the same. Once the court of appeals reversed the judgment of the district court, there was no longer in existence any final order or judgment in the case. Accordingly, upon remand, the district court had the authority, even without specific guidance or instructions from the court of appeals, to consider *de novo* granting a new trial.

The Petitioner has cited *United States ex rel. Greenhalgh v. F.D. Rich Co., Inc.*, 520 F.2d 886 (9th Cir. 1975) at page twenty-one of the Petition for the proposition that if the court of appeals had not discussed the new trial issue, upon remand, the district court would have been bound by its own prior order granting a new trial by the law of the case. In this argument, the Petitioner is talking out of both sides of its mouth.

In *Greenhalgh*, the doctrine of the law of the case was applied in a situation under Federal Rule of Civil Procedure 50(c) in which under the Rule, the court of appeals had specific authority not only to review the judgment n.o.v. but also the conditional order entered by the district court granting a new trial. In such cases, as

the court of appeals noted in its opinion in this case, the Rule specifically requires a district court in granting a judgment n.o.v. to rule on the motion for a new trial on a conditional basis so that on appeal, both orders can be reviewed if necessary. Rule 50(c) specifically provides that the conditional order granting a new trial does not render the judgment a non-final judgment.

In deciding that it had jurisdiction to entertain the cross-appeal, the court of appeals found that the situation in the instant case was similar to the situations provided for in Rules 50(c) and 50(d). The court reasoned that if such conditional orders granting a new trial do not affect finality and can be considered by courts of appeals under appropriate circumstances, the circumstances of the instant case required the same result. The court of appeals pointed out that under Rule 50(d), the court of appeals is not precluded from determining whether an appellee is entitled to a new trial or from directing the trial court to determine whether a new trial should be granted. That is precisely what the court of appeals did in this case.

If the Petitioner is correct that the court of appeals did not have jurisdiction to consider the cross-appeal, then under *Greenhalgh*, the appeal cannot operate to preclude reconsideration on remand. The general rule as stated in *Greenhalgh* is that an order granting a new trial is interlocutory and is subject to modification any time before entry of a final judgment. Only if the order is affirmed on appeal does it become the law of the case. If the court of appeals did not have jurisdiction over the cross-appeal, then the order is not the law of the case and it could be modified on remand.

Even if the district court did not and could not have reconsidered the new trial question prior to conducting a second trial, the propriety of requiring the new trial could have been raised in the court of appeals by the Respondent after the second trial. Hindsight reveals that had a second trial been held, after the trial, the district

court would have confessed its error in originally granting the motion for the new trial for the same reasons it set forth in its Opinion of January 18, 1983 (Appendix F). After the second trial, the district court would have admitted that it should not have ordered the new trial. At the very least, the order granting the new trial would have been reviewed by the court of appeals following a second trial.

In *Taylor v. Washington Terminal Company*, 409 F.2d 145 (D.C. Cir. 1969), cert. denied, 396 U.S. 835 (1969), the plaintiff refused to accept a remittitur as to damages. A second trial was held which resulted in a substantially lower damage award for the plaintiff. The plaintiff appealed and alleged that the trial judge abused his discretion in granting the remittitur. The court of appeals agreed with the plaintiff, set aside the order granting the new trial and ordered reinstatement of the original verdict for the plaintiff. The same result was reached in this case without the wasted effort of the second trial.

It would make no sense to hold that the Respondent should have lost the opportunity to convince the district court that the new trial order was erroneous simply because the Petitioner appealed from the original final judgment. The better, more sensible and more efficient rule would provide that the court of appeals had authority to consider the cross-appeal but that if it did not, on remand the district court was free to consider the grant of the motion for a new trial. With the benefit of hindsight introduced by the Petitioner when it included the remand decision in its Appendix, this Court can appreciate the economy achieved by the court of appeals in remanding the new trial order for reconsideration by the district court.

The decision of the court of appeals in considering the cross-appeal can easily be sustained on alternative grounds. To reach the result it did, the court of appeals did not have to rely upon the existence of a cross-appeal. Since it had the case before it on the Petitioner's appeal,

the court of appeals had authority to consider other issues raised by the case even in the absence of a cross-appeal. The requirement of a cross-appeal is a rule of practice and not a rule of jurisdiction. See *Lucas v. Gulf and Western Industries, Inc.*, 666 F.2d 800, 805 (3d Cir. 1981); *Scott v. University of Delaware*, 601 F.2d 76, 82-84 (3d Cir. 1979), cert. denied, 444 U.S. 931 (1979); *Butler v. First National Bank*, 552 F.2d 1112, 1114 (5th Cir. 1977); *Arnold's Hofbrau, Inc. v. George Hyman Construction Co., Inc.* 480 F.2d 1145, 1150 (D.C. Cir. 1973). See also 15 Wright, Miller and Cooper, Federal Practice and Procedure §3904 (1976). Cf. *Massachusetts Mutual Life Insurance Co. v. Ludwig*, 426 U.S. 479 (1976). Thus even if the Respondent had not filed a cross-appeal, the court of appeals had jurisdiction to review the status of the conditional order granting the new trial.

The fundamental flaw in the Petitioner's argument is that the court of appeals actually did not rule on the cross-appeal. Although the court said it would consider the cross-appeal, the court of appeals did not specifically rule on the cross-appeal. The court of appeals did reverse and remand on the Petitioner's appeal but it took no action on the cross-appeal.

28 U.S.C. §2106, set forth at page iv, above, specifically provides that an appellate court may modify, vacate, set aside or reverse any judgment lawfully brought before it for review. The Petitioner herein brought the district court judgment before the court of appeals. Without even considering the cross-appeal, the court of appeals had authority, after vacating the final judgment, to remand the case to the district court for further consideration.

In *Neely v. Eby Construction Co., Inc.*, 386 U.S. 1027 (1967) this Court upheld the authority of a court of appeals to order dismissal of an action after reversing the denial of a defendant's motion for judgment n.o.v. The Court held that as a matter of statutory power, the court of appeals had such authority under 28 U.S.C. §2106

and that this procedure was authorized under Rule 50(d). The Court held that under Rule 50(d) in the first instance, the court of appeals has authority to consider the new trial question. This does not interfere with the right to a jury trial.

As a matter of fundamental fairness to the litigants and to the district court, after the court of appeals vacated the remittitur, it was incumbent upon it to remand the entire case to the district court in order to allow the district court to consider in the first instance whether it believed that an unconditional new trial order was appropriate. Since the remittitur and the new trial grant were conditional and part of the same order and judgment, the propriety of the latter was necessarily in question as soon as the former was vacated.

Certainly the district court had authority to reconsider its new trial order after being told that the remittitur was improper and could not be attached as a condition to a new trial order. Understandably, the court of appeals did not want to engage in idle speculation as to how the district court *might* have ruled in the first instance if it had known that the remittitur was not available to it. In such cases the proper alternative is to remand to the district court which is in the best position to pass on the new trial question unrelated to the remittitur. See *Iacurci v. Lummus Co.*, 387 U.S. 86 (1967).

The court of appeals did not consider or act upon the cross-appeal. Instead the court of appeals properly left the new trial determination to the discretion of the district court. Certainly, that approach was more favorable to the Petitioner rather than having the court of appeals order judgment entered on the jury verdict without the necessity of reconsideration by the district court. In *Ferguson v. Chester A. Poling, Inc.*, 285 N.Y.S. 340, 247 A.D. 727 (2d Dept. 1936), cited by the court of appeals, the appellate court under these same circumstances ordered judgment entered on the jury's verdict without consideration by the trial court of the motion for

a new trial. The Appellate Division held that "in theory and amount the question of apportioning the negligence was peculiarly within the province of the jury . . ." 285 N.Y.S. at 341. *Ferguson* also was a Jones Act action by a seaman for personal injuries.

C. The court of appeals did not in any way interfere with the Petitioner's right to a trial by jury nor did the court of appeals interfere with the discretion of the district court.

It must be emphasized that the court of appeals took no specific action with regard to the grant of the motion for a new trial. The court of appeals merely reversed the judgment and remanded the entire case to the district court so that the district court could exercise its own discretion.

The Petitioner claims that somehow the action of the court of appeals violated its right to a trial by jury under the Seventh Amendment to the United States Constitution. It is impossible to understand this argument. The only jury verdict that exists is the one rendered in favor of the Respondent which included a finding of four percent contributory negligence by the Respondent. The district court improperly interfered with the Respondent's right to a jury trial by ordering the remittitur in relation to contributory negligence. That error was corrected by the court of appeals and the Petitioner does not question that result. It is difficult to comprehend what basis the Petitioner has for claiming its right to a jury trial has been abridged.

The Petitioner claims that the court of appeals "reexamined" facts found by the jury. Even assuming that this is so, the court of appeals took no action to interfere with the findings of the jury. The court of appeals merely reviewed the record to determine whether the jury's 4% assessment was supported by the record. The court of appeals was attempting to give full play to the sanctity of the jury verdict.

What the court of appeals did was simply point out to the district court that the district court's opinion did not adequately set forth the court's reasons for finding that the jury had no basis upon which to find the four percent contributory negligence. The court of appeals noted that based upon its review of the record, there was at least one theory under which the jury's assessment of contributory negligence appeared to be sustainable.

The court of appeals made no finding with respect to this theory but merely pointed out to the district court that the district court's opinion did not make it clear whether the district court had considered that possibility. Certainly the court of appeals had the authority, if not the obligation, to point out to the district court that the latter's basis for ordering a new trial needed further elaboration.

The Petitioner claims that the court of appeals' discussion interfered with the discretion of the district court. This Court now has the benefit of having before it the district court's decision on remand (see Appendix F). The district court's opinion on remand makes it abundantly clear that the district court exercised its own discretion without being unduly influenced by the discussion set forth by the court of appeals. The clear proof of this is the fact that the district court, in deciding to deny the motion for a new trial, "carefully reviewed the evidence" again (Appendix F-9). The district court states that this review resulted in a "significantly altered perception" of the basis for the jury finding the four percent contributory negligence. The district court then concluded that its original order granting the new trial was based on a misperception and that the suggestion offered by the court of appeals was also not correct. Thus, the district court clearly reached its own conclusion concerning the propriety of granting the motion for a new trial and showed that it was not unduly influenced by the discussion in the court of appeals' opinion.

Without citation of authority, the Petitioner suggests at page twenty-two of the Petition that the court of appeals in remanding a case should not give guidance to the district court. The Petitioner suggests that guidance should only be given for use in future cases and not in the case under consideration. This proposition is clearly erroneous, impractical and at variance from commonly accepted practice. See e.g., *Baker v. United States Steel Corporation*, 492 F.2d 1074, 1079 (2d Cir. 1974); *Stans v. Gagliardi*, 485 F.2d 1290, 1292 (2d Cir. 1973).

- D. **The court of appeals was correct in suggesting that in this case a second trial could be limited to liability since the jury had made clear by its special verdict what the Respondent's actual damages were; since on remand the district court declined to order a new trial, this issue is moot.**

Under the Petitioner's theory, the original decision of the district court that a retrial, if necessary, would be limited to liability issues, was interlocutory in nature and therefore was not properly before the court of appeals. The Petitioner urges this Court to review the determination of the court of appeals on this issue even though the district court has subsequently determined that a new trial need not be held.

Since the second decision of the district court is currently on appeal before the court of appeals, there is no need for this Court to address the issue at this time. The district court, in the first instance, based on its special familiarity with the first trial, determined that if a second trial were necessary, the trial should be limited to liability. Indeed, in its opinion (Appendix C-24 and 25), the district court in one place stated that a retrial could be limited to the issue of contributory negligence and in another place stated that the retrial would cover all liability issues including contributory negligence. In its final judgment (Appendix E), the district court referred to a conditional new trial on liability.

The district court properly concluded that there was no basis to disturb the jury's damage award. The sole rationale for the district court's original conditional order of a new trial was based on an alleged jury error in assessing contributory negligence. Therefore, the district court properly found that a hypothetical retrial need not include the damage issue. There is no basis to disturb this finding of the district court, especially as approved by the court of appeals.

Even if there were to be a new trial, it is unnecessary and unfair to the plaintiff to require that the damage issue be retried. The courts have recognized that detailed special interrogatories are useful tools to help assess a jury's verdict and to avoid retrial of issues already decided without error by a jury.

The issues of liability and damages are separable both factually and conceptually and are often tried separately. There simply is no reason to require a second jury to become embroiled in the damage issue since that was already tried once without error. In fact, it would seem that separating the issues is a more pure way to reach a conclusion. By considering the two separately, the jury will not be led into a possible compromise or confusion as to the issue it is required to address.

In deciding whether a defendant is negligent and whether a plaintiff's negligence contributed to a plaintiff's injuries, the jury certainly should not and does not consider the extent of the monetary damages. If a new trial had been required in this case, this was a peculiarly appropriate one for limiting the retrial to liability alone. The district court so found in the first instance and in the absence of a clear abuse of discretion, this finding must stand.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the court of appeals is correct on the merits and does not in any event present any novel or complex issue or a conflict between circuits. Neither does the decision conflict with any decision of this Court. Nothing said or done by the court of appeals warrants review by this Court. Consideration by this Court is unnecessary since the Petitioner currently has an appeal pending in the court of appeals. Accordingly, the Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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